Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-71

In re the Application of

SANTA MONICA COMMUNITY COLLEGE DISTRICT — File No. BPED-920305ME

For Construction Permit for a New Noncommercial FM Station on Channel 201B[1] in Mojave, California

MEMORANDUM OPINION AND ORDER

Adopted: January 25, 1996; Released: February 1, 1996

By the Commission:

1. This item gives instructions to the Presiding Administrative Law Judge for the disposition of an application by Santa Monica Community College District (Santa Monica).

I. BACKGROUND

2. This proceeding originally involved mutually exclusive applications by Santa Monica and Living Way Ministries (Living Way) for new noncommercial FM radio stations. Santa Monica proposed to operate on channel 204B in Mojave, California, while Living Way proposed operation on channel 205B in Lancaster, California. Santa Monica and Living Way entered into a settlement agreement intended to resolve the mutual exclusivity between their proposals and to permit the grant of both applications. Under the agreement, Santa Monica sought to amend its application to specify operation on channel 201B instead of 204B and to make other related changes in its engineering proposal.

3. On July 21, 1994, Chief Administrative Law Judge Joseph Stirmer (ALJ) adopted an order granting the parties' Joint Petition for Approval of Settlement Agreement (which had been filed July 1, 1994), granted Santa Monica's Petition for Leave to Amend (specifying channel 201B), and granted Living Way's application. *Santa Monica Community College District*, FCC 94M-453 (Jul. 25,1994). Santa Monica's application remained in hearing status pending a determination by the FAA as to whether Santa Monica's proposal constituted an air hazard.[2]

4. At the time the settlement was approved, however, the parties were unaware that Santa Monica's amended proposal conflicted with a pending application, filed July 13, 1994, by California State University, Long Beach Foundation (Cal State) to modify the facilities of noncommercial FM radio station KLON, channel 201B in Long Beach, California. The Cal State application was put on public notice as accepted for filing on July 21, 1994, the same day that the ALJ adopted his order approving the settlement. Santa Monica and Cal State indicate that their proposals are mutually exclusive.

5. Santa Monica filed with the ALJ a Motion for Grant of Pending Application. In it, Santa Monica argued that, because Cal State failed to object to the settlement in a timely fashion[3] and Santa Monica's amended proposal conforms to the Commissions rules and policies, Santa Monica's application can be granted. The Bureau opposed Santa Monica's motion. It observed that under 47 C.F.R. § 73.3605 Santa Monica's application would have to be removed from hearing status. That section provides:

> [(b)](3) In any case where a conflict between applications will be removed by an agreement for an engineering amendment to an application, the amended application shall be removed from hearing status upon final approval of the agreement and acceptance of the amendment.
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> . . . .
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> (c) An application for a broadcast facility which has been designated for hearing and which is amended so as to eliminate the need for hearing or further hearing on the issues specified, other than is provided for in paragraph (b) of this section, will be removed from hearing status.

Removal of Santa Monica's application from hearing status would result in its being returned to the processing line and put on public notice. This would give Cal State and any other interested parties the right to seek comparative consideration with the Santa Monica proposal. The Bureau also observed, however, that the prevailing practice of administrative law judges appeared to be to retain amended applications in hearing status despite § 73.3605 and, upon favorable consideration, to grant them.

6. The ALJ declined to grant Santa Monica's application. *Santa Monica Community College District*, FCC 95M-174 (July 28, 1995). He agreed with the Bureau that there is an apparent conflict between the provisions of § 73.3605 and prevailing practice. He also noted equities in favor of retaining Santa Monica's application in hearing status and that strict application of § 73.3605 would tend to discourage settlements. He therefore certified to the Commission the question of the disposition of Santa Monica's application.

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[1] As discussed herein, Santa Monica amended its application to substitute channel 201B in lieu of 204B. We have modified the caption accordingly.

[2] On September 1, 1994, Santa Monica submitted an amendment indicating that the FAA had made a "no hazard" determination.

[3] Santa Monica claims that Cal State had actual knowledge of Santa Monica's proposal no later than August 22, 1994, when Santa Monica filed an informal objection to Cal State's application.

II. DISCUSSION

7. We will waive § 73.3605 and direct the ALJ to retain Santa Monica's application in hearing status. Santa Monica's application cannot be granted, however, until Cal State's hearing rights have been ascertained and accommodated. In many respects, this case resembles precedents referred to by the ALJ and the Bureau in which applications were retained in hearing status despite the provisions of § 73.3605. *See Christian Broadcasting Association,* 22 FCC 2d 410, 411-12 ¶ ¶ 6-7 (1970); *Cabool Broadcasting Corp.,* 56 FCC 2d 573, 575-76 ¶ ¶ 5-6 (Rev. Bd. 1975). These cases found that it would be equitable to permit an amending applicant to remain in hearing status so that it could be granted without exposure to additional competing applications. In these cases, as here, the amending applicant had been the first to express an interest in the channel originally applied for, but another applicant had subsequently filed, necessitating a hearing, which the amendment was intended to avoid. Additionally, returning the amended application to the processing line might have resulted in delay in the initiation of service. These factors support granting the equitable relief that Santa Monica requests.

8. In an important respect, however, this case differs significantly from these precedents, in which no persons other than the settling applicants had expressed an interest in filing for the channels that the applicants requested in their amendments, let alone filed an application for that channel. Similarly, in *Citadel Communications, Ltd.,* FCC 95-264 (June 27, 1995), a case cited by Santa Monica in its Motion for Leave to Supplement Record, filed October 25, 1995, no competing applications or expressions of interest were on file at the time the application was granted. *See also Amendment of Section 73.606(b),* 10 FCC Rcd 3183, 3183 n.1 (1995) (involving the channels at issue in *Citadel).* The lack of direct prejudice to others was an important factor in past cases for waiving the rule. *See Cabool,* 56 FCC 2d at 576 ¶ 6. Here, in contrast to all these cases, Cal State had filed an application prior to grant of the settlement agreement -- although the parties were unaware of this. If that application is mutually exclusive with Santa Monica's, which it appears to be, granting Santa Monica's application without affording Cal State a hearing would violate Cal State's statutory right to comparative consideration. *See Ashbacker Radio Corp. v. FCC,* 326 U.S. 327 (1945).

9. Consistent with *Christian* and *Cabool,* we will waive § 73.3605 so that Santa Monica's application will remain in hearing status. However, consistent with *Ashbacker,* it cannot be granted until -- after further processing of the two applications -- a determination is made as to whether it is mutually exclusive with Cal State's application. If this should prove to be the case, the Bureau should issue an order consolidating Cal State's application into this proceeding for comparative hearing. In this regard, the ALJ expressed his view that a comparison of the Santa Monica and Cal State proposals may well result in a decisive 307(b) preference in favor of one of the applicants -- *i.e.,* that the case may turn on a comparison of the needs for the proposed new services, rather than an evaluation of the applicants' comparative qualifications. *Santa Monica Community College District,* FCC 95M-174 (Jul. 28, 1995) at n.5. Pursuant to the provisions of 47 U.S.C. § 309(b), public notice should be given of the acceptance for filing of the amendment to Santa Monica's application to permit the filing of petitions to deny. As contemplated by the precedent discussed above, however, no competing applications will be accepted after the release date of this order. Upon completion of the further action described in this paragraph, the ALJ may make an appropriate grant.

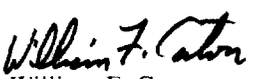
10. An additional matter warrants comment. The Bureau's account of the widespread practice of waiving § 73.3605 suggests that the rule should be reexamined. If the rule must continuously be waived to achieve an equitable result in the public interest, the rule should be modified accordingly. The Bureau should, therefore, prepare a notice of proposed rulemaking to modify § 73.3605 to take into account situations such as that involved in this case.

III. ORDER

11. ACCORDINGLY, IT IS ORDERED, That the Motion for Leave to Supplement Record, filed October 25, 1995, by Santa Monica Community College District IS GRANTED.

12. IT IS FURTHER ORDERED, That waiver of 47 C.F.R. § 73.3605 IS GRANTED and that the application of Santa Monica Community College District SHALL REMAIN in hearing status, subject to further action by the Mass Media Bureau and the ALJ, as set forth in paragraphs 9-10, *supra.*

FEDERAL COMMUNICATIONS COMMISSION



William F. Caton
Acting Secretary